No. 8117

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FERRYBOATMEN'S UNION OF CALIFORNIA (an unincorporated association), FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY and THE WESTERN PACIFIC RAILROAD COMPANY,
Appellees.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellee.

APPELLEES' PETITION FOR A REHEARING.

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Subject Index

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APPELLEES' PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellees respectfully petition the Court that the above entitled appeals be reheard and reargued

before it with such permission to appellants and appellees to file additional briefs as well as orally to argue, as the Court may deem desirable.

At the outset we make it plain that we ask for no rehearing on the questions of the allowability of interest or the defenses of release and accord and satisfaction. The Court was unanimous on those points, and we feel that we should not further press them.

But we do desire to insist, as earnestly as we may in genuine deference, that the majority opinion is erroneous in that it has misconstrued the status of both classes of appellants' assignors under the award, even giving that award a retroactive effect, as it must be given; that it has been persuaded by arguments and isolated bits of testimony collateral to the main issue to remand the case for an assessment by the District Court for overtime that is neither within the spirit or meaning of the award—retroactively applied —nor at all consistent with the record facts, or even with the language of the majority opinion.

Moreover, that one important class of claims—the "broken assignment" claims hereinafter discussed—are, apparently, not even considered in or passed upon by the majority opinion.

We feel that a rehearing should be granted for a further purpose, namely, to lay down a *definite* rule or rules for the District Court to follow in both classes of cases if this Court shall on rehearing again conclude to reverse the decree of that Court, but shall again, as does the majority opinion, order that Court, to "proceed with the trial".

We respectfully contend that the paragraph on page 5 of the printed opinion, reading:

> "The accounting is a matter for the trial court, and should be conducted on an interpretation of the award which will give to the members of the crews overtime for any day's services for the hours *in excess of any eight hours* in that day. Since the hourly overtime is the same as hourly straight time, it is only necessary to compute the straight time hourly wage;"

considered in and of itself as a rule to be followed by the District Court fully justifies and sustains the payments actually made the plaintiffs' assignors when their six months' service on the 12-24 hour watches ended with the entry of judgment by the District Court after affirmance of the award by this Court.

We stress the phrase in the quotation next above that the "interpretation of the award" (shall be that) "which will give to the members of the crews overtime for any day's services for the hours in excess of any eight hours in that day" and that it is "only necessary to complete the straight time hourly wage".

We respectfully insist that the evidence shows, time and again, without contradiction, that the formula there stated does, when applied to each of plaintiffs' assignors, give him exactly what he has already received—a rate per hour for the time actually worked (and all of the assignors worked full twelve hour watches, it being conceded that overtime over twelve hours on any one watch has been fully paid for) identical with that which an 8-16 hour man would have been paid under and after the award if he had worked

the same hours per day on the same days as the 12-hour men, plaintiffs' assignors.

Neither the so-called Hancock formula nor what he thought it meant has anything to do with the ultimate merits of the case. The essential question is: What should the plaintiffs' assignors have been paid had no effort been made to set aside the award and had they continued to work on 12-24 hour watches, and having determined what they should have been paid, were they actually paid that amount?

TWO DISTINCT CLASSES OF CLAIMS.

There are two, and but two, classes of employees involved:

First: Those who did not work all of the 20 or 21 watches in a given month, (the number of watches depending on the month), on the 12-24 hour basis. Those months are *"broken assignment months";*

Second: Those who worked each and all of the 20 or 21, 12-24 hour watches in a given month which we hereinafter term "full service" men. Those *full months* are in a separate class and will be separately treated.

From a large photostatic reproduction of Plaintiffs' Exhibit 8-A relating to Southern Pacific Co., not included in the copies of the Record, filed with the original record and which we respectfully ask the Court to examine, it will be seen that few men worked every 12-24 hour watch every month during the six months in question. The same is true of the Northwestern

Pacific men. Each calendar month was treated separately, and during the six months paid for separately. If a 12-24 hour man worked all of the 12-24 hour watches in a given month of that six months, he received a month's salary, which was exactly the same as that of the eight hour men of his class who worked all of the 26 or 27 eight hour watches during that month. There is no question whatever as to the correctness of the statement just made and the evidence clearly so shows.

If the 12-24 hour man worked less than the full 20 or 21, 12-hour watches in a given month he was in an entirely different class. He was on a "broken assignment" not entitled to a monthly wage, either as an 8-hour man, or, prior to the award as a 12-hour man.

We shall first deal with the "broken assignment" months of which there are many, as shown by the photostat above referred to, which months and the employers' obligations arising therefrom appear to have been entirely overlooked in the majority opinion.

BROKEN ASSIGNMENT MONTHS, WHERE A MAN WORKED LESS THAN THE FULL 20 OR 21, 12-HOUR WATCHES FOR THAT MONTH.

Let us first consider the contract provisions, *as the contract was amended by the award* and which relate to "broken assignment" compensation, and then consider what the uncontradicted testimony shows was the proper basis of pay for an eight hour man who worked a "broken assignment" in a given month. It will be shown that plaintiffs' assignors who worked

"broken assignment" months received exactly the same pay as though they had been eight hour assignment men who worked twelve hour watches on the same days.

The difficulty in applying the contract as amended by the award—and which as amended provided only for eight hour regular assigned watches—is more superficial than real.

By the stipulation in May, 1928, made pending appeal by the carriers to this Court it was provided (R. 29) that if this Court affirmed the award, as it later did, "the retroactive date of the new watch rules which are a part of that award shall be advanced from November 1, 1927" (when but for the impeachment proceedings they fully would have taken effect), "to March 1, 1928."

The "new watch rules", so far as here applicable, consisted solely in the award amending Rule 6 so as to leave out the provision for a 12-24 hour watch for assigned crews.

Rule 6 originally read (Agreement of January 16, 1925) (R. 70):

> *"Rule 6.*
>
> Assigned crews, except as hereinafter provided, will work either on the basis of:
>
> (a) Twelve (12) hours on watch, then twenty-four (24) hours off watch, without pay for time off.
>
> or
>
> (b) Eight (8) hours or less on watch each day for six (6) consecutive days."

The submission to arbitration provided (R. 84)—and under the Railway Labor Act the submission is jurisdictional in the fullest sense of that term—that:

> "The specific questions submitted under Rule 6 are:
>
> (a) Shall the rule remain as written, or
>
> (b) Shall the portion of the rule down to the word 'Exceptions' be changed so as to read:
>
> (Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days, and
>
> (c) If the rule is changed as under (b) hereof, whether, and if so to what extent, the exceptions shall be changed."

The Award and Decision which begins at R., page 24, after increasing rates of pay by $10.00 per month —not involved here (R. 173)—provides a new section 6 down to the word "Exceptions" in the following language (R. 25)—no service under the "Exceptions" being here involved:

> *"Hours of Service*
>
> Rule 6.
>
> Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days."

The *only question relative to overtime* that was submitted to arbitration is stated in the agreement to arbitrate (R. 84) as follows:

"Rule 8—Overtime

(Present rule reads as follows)

'The monthly salary now paid the employes covered by this Agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate.'

"The specific questions submitted under Rule 8 —Overtime, are:

(a) Shall the present rule providing for pro rata rates of pay for overtime remain in effect, or

(b) Shall the verbiage of the rule be modified to provide for time and one-half for overtime after eight (8) hours when there is no relief crew waiting under pay?"

The Board answered that question by re-adopting the existing Rule 8, thus denying time and one-half for overtime—such re-adoption appearing in the award as follows:

"do hereby award and decide as follows regarding the specified differences:" (R. 25.) * * *

(R. 27-28) *"Overtime*

Rule 8.

The monthly salary now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate."

The agreement to arbitrate, as was entirely proper and necessary under the Railway Labor Act, provided (R. 85):

> "Fifth: In its award the Board shall confine itself strictly to decision as to the questions so specifically submitted to it."

But all the time, before the agreement to arbitrate was executed, during the arbitration proceedings and the impeachment proceedings and up to the time of trial there were other provisions that were not submitted to arbitration, that were of equal standing with the sections quoted above, that were untouched and unaffected by court proceedings or judgment, that must be considered *in pari materia* with all other sections of the agreement as amended by the award and that fixed and defined the basis of pay for a "broken assignment" month.

Those provisions—unchanged and unaffected by the award—are (Contract, R. 69)—appended as a note to Rule 2 which fixed the *monthly* rates of pay. (R. 69.) Rule 2 was changed by the award in but one respect, the only respect as to which the Board had jurisdiction by increasing by $10.00 the monthly rate of pay. (Award, R. 25.) The Note to that section was not submitted to the Board (Arbitration Agreement, "Fourth", R. 82) and was not changed by the award. (Award—"Rates of Pay", R. 25.)

That note, which is governing and fully controlling as to all of plaintiffs' assignors read in the contract and still reads (R. 69):

"NOTE: Employes working *broken assignments* will be paid in the following manner:

(a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313.

(b) On 12 and 24 watches, allow one and one-half days for each watch worked, on basis of 12 times the monthly salary divided by 365.

(c) On 12 and 24 watches, with one watch off per month, allow one and one-half days for each watch worked, on basis of 12 times the monthly salary, divided by 347.

Above applies to employes, whose monthly assignment is broken as well as to relief employes and those in extra service."

Evidently the Arbitration Board let stand sub-sections (b) and (c) of the note because it had no power to change them; or, perhaps, because it may have felt that in some way they applied to the 12-24 hour watch *provided for* in Exception 7 to Rule 6. (R. 26.)

In any event we are not here concerned with sub-sections (b) and (c) of the Note next hereinabove quoted.

What is apparent and conclusive was that the award plus the unamended portion of the contract did these things as to "regular assigned crews":

(For convenience, throughout this petition, we shall refer only to firemen as the rules governing all classes of employes were the same before as well as after the award, the only difference being in the rate of monthly pay.)

1. The monthly pay of firemen was raised to $146.35 per month. (Award R. 25.)

2. Rule 6 was changed by the award so as to abolish 12-24 hour watches for "assigned crews" and so as to read:

"Hours of Service

Rule 6. Assigned crews will work on the basis of eight (8) or less on watch each day for six (6) consecutive days."

3. The exception of the monthly rate of pay, Rule No. 6, was left unchanged and read:

"NOTE: Employes working *broken assignments* will be paid in the following manner:

(a) On 8 and 16 watches, allow for number of days worked on basis of 12 times the monthly salary, divided by 313.

* * * * * * *

Above applies to employes, whose monthly assignment is broken as well as to relief employes and those in extra service."

4. The overtime rule (Rule 8) was unchanged by the award and provided (R. 27-28):

"Overtime

Rule 8.

The monthly salary now paid the employes covered by this agreement shall cover *the present recognized straight time assignment.* All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the pro rata rate."

5. Rule 9, for computing overtime was not submitted to the Board, which did not attempt to change it and, so far as applicable to 8-hour watches read as in the contract of 1925 (R. 72):

"Fixing Overtime Rate

RULE 9.

To compute the hourly overtime rate divide twelve times the monthly salary by the present recognized straight time annual assignment.

NOTE: Under above the hourly overtime rates, for employes working different assignments, will be arrived at in the following manner:

(a) On 8 and 16 watches, divide 12 times the monthly salary by 2504."

The majority opinion (opinion p. 5) quotes that Rule 9.

What is a "broken assignment"?

The Note to Rule 2—unchanged by the award and above quoted—uses the expression "broken assignments" and provides a formula under which "employes working broken assignments will be paid." In the last sentence of the Note appears the provision (R. 69):

> "*Above applies to employes, whose monthly assignment is broken* as well as to relief employes and those in extra service."

No definition of "broken assignment" is found in the testimony or exhibits until plaintiffs' rebuttal closed. Probably counsel on both sides were so familiar

with the term and its application that its precise definition was overlooked in both the plaintiffs' and defendants' case in chief and in plaintiffs' rebuttal.

Feeling that that omission should be supplied, defendants' counsel near the close of the evidence sought to supply it, and the following colloquoy took place (R. 290):

> "Mr. Booth. We ask counsel to stipulate that the term 'broken assignment' as used in the note to Rule 2, of the contract of 1925, Plaintiffs' Exhibit Number 2, means a case where an employe on a regularly assigned crew, as defined in Paragraph (a) and/or (b), of Rule 6 of that agreement, failed to work continuously throughout the calendar month on the entire series of watches which were included in the regular monthly assignment of watches for that month for the regular assigned crew of which he was a member.
>
> Mr. Sharp. Now, may I add at that point; Counsel's statement is correct, with two limitations. The term 'broken assignment' covers the situation where a man did not work all of the assignments which the company assigned him to. Now, the reason I make that limitation is, I do not want counsel to argue afterwards that the situation here involved, *where the men worked all the assignments the company actually assigned them to, is a situation of broken assignments.* Our contention in that regard is, if the company assigned the men to work on 20 or 21 watches a month, that was a full assignment and not a broken assignment, but with that limitation, which is that where a man fails to work voluntarily, or fails to work less than the full number

of watches assigned by the company, that is designated in the agreement as 'broken assignments.'

The second limitation which I want to make with respect to that is this: It is self-evident, but I want to be sure there is no misunderstanding. The term 'broken assignment' as stated in counsel's requested stipulation, refers to Rule 6 (a) and/or Rule 6 (b). Of course, it is the contention of the Union that as of March 1, 1927, there was not any '(b)' part to the rule at all, and that the only rule in existence as of that date is the one calling for eight-hour watches. So we do not want to be deemed to be stipulating that a man working on a twelve-hour watch came within the rule, because there was no such rule. But I think that gives counsel what he asks for."

At the time, the reservations made by Mr. Sharp were not regarded by us as satisfactory. Looking at them in cold type it seems that he answered our question in the affirmative, and that his first reservation merely means that the first class of cases we are now discussing—those when an assignor of plaintiff "failed to work continuously through the calendar month" all of the 20 or 21, 12-24 hour watches in that month—are true cases of "broken assignment months"; analysed, his stipulation means nothing less.

But at the time we were not satisfied with the reply and we proceeded to show what "broken assignments" actually meant.

We at once recalled Witness Gorman who had previously testified (R. 252):

"I am employed by the Southern Pacific Company. At the present time as trainmaster's clerk. I handled the payrolls of the steamer division from the latter part of 1923 to the latter part of 1930. I am familiar with the adjustment that was made in September and October, 1928, with the former 12 and 24 hour men. I prepared the payroll on which these pay checks were based."

(We apologize for devoting so much space to record quotations but feel that it may be more convenient for the Court to read the testimony in this form than to be referred to various pages of the record.)

Mr. Gorman, when re-called, as above stated, said (R. 292-294):

"Mr. Booth. Q. Mr. Gorman, when a man on an 8 and 16 hour watch or a 12 and 24 hour watch, worked on any one or more watches less than the full number of assigned watches for that month, it has been stipulated here that that is regarded as a broken assignment. Is that the manner in which the payrolls were prepared?

A. Yes, sir, on the broken assignment basis.

Q. Now, when a man worked on all the assigned watches during the month, but on one or more watches he voluntarily worked less than the 8 or 12 hours prescribed for that watch, was that regarded as a broken assignment? I do not refer to a case where the company itself laid up a boat short of the full eight hours.

A. If he did not fulfill his full series, why, it was a broken assignment.

Q. Suppose on a 21-watch assignment, a man worked twenty full twelve hour watches, and one

watch, voluntarily, of ten hours, was that regarded as a broken assignment? A. Yes, sir.

Q. Were the payrolls made up on that basis?

A. Yes, sir.

Q. In the case of a broken assignment where less than the full number of watches were worked, was the man paid by the day? A. Yes, sir.

Q. The agreement of 1925 provides, in Rule 2, for a method of ascertaining the daily pay. Now, was that, in practice, modified by an interpretation issued by Mr. Hancock on May 1st, 1926?

A. Yes: that was modified by Mr. Hancock's interpretation.

Mr. Booth. I have here a copy of that memorandum, which is initialed as I understand it, by Mr. Deal, and I would like to put it in. It is our file copy. I would like to have it copied in the record. It is very long, and I do not think it is necessary to read it in full at this time.

Mr. Sharp. I would like to have it in as an exhibit, instead of putting it in the record.

Mr. Booth. It has Mr. Deal's initials on it.

Mr. Sharp. Mr. Deal tells me he did initial a copy.

Mr. Booth. Q. Under this interpretation of May 1st, 1926, when an 8-hour man worked a broken assignment, how did you arrive at the daily rate of pay?

A. We took the number of days his crew would work in the month and divide that into his monthly salary and establish a daily rate of pay for an eight hour day.

Q. When a man on a 12-hour assigned watch worked less than the required number of watches, under this interpretation, how did you arrive at his daily rate of pay?

A. If he was on a 21-watch assignment, we would divide 31½ into the monthly rate and would then obtain an eight-hour rate of pay and we would pay him 1½ days at the 8-hour rate of pay.*

Q. At the 8-hour rate of pay on the 12-hour basis. A. Twelve hour basis, yes.

Q. And if he worked on a 20-watch assignment, was the same method followed?

A. The same method; only we would use 30 as the divisor.

Q. Was this memorandum of May 1, 1926, modified subsequently to change the divisor in the case of any of these 12-hour men, and, if so, how?

A. Yes. The memorandum of May 1st shows that in the case of a 21-watch assignment, you would use a divisor of 1/31st, and on the memorandum of May 25th it corrected that so you would use a divisor of 1/31 and ½.

Q. Was that the method that was subsequently followed in making up the payrolls?

A. Yes, sir."

Mr. Gorman's testimony just quoted was explained further by Mr. Hancock (R. 315) by saying that a further change on May 25th or 26th, 1926, in the memorandum of May 1st, 1926, was made to take care of an occasional situation. We quote (R. 315):

"Mr. Booth. Q. Mr. Hancock, you heard Mr. Gorman's testimony this morning regarding the memorandum of May 1, 1926, and the subsequent memorandum of May 25th or 26th, 1926, which slightly changed that memorandum?

*That is exactly what was done in "broken assignment" months in the instant case.

A. Yes, sir, it was slightly changed. Mr. Deal called my attention to the fact that a 12 and 24-hour man starting his first watch early in the month would actually have 31½ days service in a 31-day month.

Q. In other words, if you followed the formula of May 1, 1926, he would get a half a day the worst of it on a broken assignment?

A. Yes, sir.

Q. I ask you whether this memorandum applied to the Northwestern Pacific, as well as to the Southern Pacific?

A. I would not be able to answer that. Copies of it were furnished to the Northwestern Pacific, but whether they placed them in effect, I could not testify.

Q. Were these memoranda reached after a conference between you and Mr. Deal?

A. Well, Mr. Deal was consulted with and had to do with the preparation of the memorandum. He initialed them when they were completed.

Q. And after they were reduced to mimeographed form, did you send him copies of them?

A. Yes, sir.

Q. Was there ever, to your knowledge, any complaint from Mr. Deal or anyone else regarding the interpretations as set forth in the memoranda?

A. Only as to the suggestion with respect to the 31½ eight hour days."

To summarize:

An eight hour fireman, after the award was entitled:

If he worked all watches in a month, to	$146.35
If he worked eight hours or less on a "broken assignment"—for each eight hour day, to	5.6109
If he worked over 8 hours on any one watch, he was entitled per hour to	.7014

which overtime rate per hour was the same as the straight rate.

What the 12-24 hour "broken assignment" men were actually paid during the six months and by additional checks.

There is no dispute as to this. The amounts paid them for each twelve hour watch on a broken assignment are separately shown on the large photostatic Southern Pacific Table, Plaintiffs' Exhibit 8A, filed herein with the original record. The payments are also testified to at R. 252-261, by Gorman, who made out the payrolls for the additional checks (R. 252-261); and further by him when recalled (R. 306-308).

On page 307 is a table showing what a 12-24 hour fireman on a broken assignment was paid during the 6 months and what he additionally received at the end of the said six months.

The net result therefore is that if an eight hour man or any other member of an assigned crew did not work all of the watches in a calendar month he worked a broken assignment and was to be paid on the basis of the Note to Rule 2—which note was not

changed by the award and is quoted above (also R. 69).

Still taking a fireman, to avoid constant qualification and explanation.

Under the award (R. 31) a fireman's pay was increased to $146.35.

Applying subdivision (a) of the Note to section 2, (R. 69)—"allow for days worked on the basis of 12 times the monthly salary divided by 313"—produces $5.6109 per day for an 8 hour fireman.

Using the formula for the ascertainment of the hourly rate for an eight hour fireman one must use the overtime rule, Rule 9, (quoted on page 5 of the majority opinion) because as there said (Opinion, p. 5) "hourly overtime is the same as hourly straight time." That formula is: "on 16 watches, divide 12 times the monthly salary by 2504."

Under that formula the hourly rate for an eight hour fireman was 70.14 cents.

Those figures are considered by appellants' Brief to be correct mathematical computation. (Brief pp. 32, 33, 34.)

It appears that for each 12 hour watch on the broken assignment the fireman was paid on the basis of 1 and ½ eight hour days at the *12-24 hourly rate of* 60.14 cents (as increased by the award). There is no question as to overtime over 12 hours; that has been fully paid at the 8 hour watch hourly rate.

At the expiration of the six months from March 1, 1928, and when this Court had affirmed the District

Court, this same 12-24 hour fireman who worked on a broken assignment was paid the difference per hour between the 60.14 cents already paid him (the 12-24 hour watch hourly rate) and the 70.14 cents hourly rate for an eight hour fireman.

Putting it another way, the "broken assignment" 12-hour fireman was paid for the broken assignment month at the end of that month what he would have received for the "broken assignment" if the 12-24 hour watch rule had been in effect (as the monthly pay was increased by the award) and then at the end of the six months he was paid an additional sum that brought his total pay for each 12 hour watch up to an amount equaling 1 and ½ days at the increased eight hour rate.

There can be no question whatever about this. The photostatic exhibit, Plaintiffs' Exhibit 8a, shows it beyond question and stands uncontradicted. Plaintiffs offered that exhibit as "certain payments made on account of back pay." (R. 148.) But the payments were made and they speak for themselves.

These broken assignment payments have been entirely overlooked in the majority opinion although they constitute a very substantial part of the amount sued for (see table comparing fully monthly and broken monthly assignments, S. P. Co., Ex. 8a, R. 309). Virtually, the majority opinion deprives appellees of any consideration of this feature of the case. So also does it deprive the District Court, if the case be

remanded for further hearing, of any intimation as to what the majority of this Court found the proper retroactive pay to be as to broken assignments.

Typical illustrations of basis of payments actually made for services during broken assignment months:

In the findings (R. 132 and 133) will be found two tables that illustrate just what was paid currently to a 12-24 hour man who was a "broken assignment" man and what he additionally received. These tables are based on Plaintiffs' Exhibit 8a and on Gorman's testimony, both of which are undisputed.

First it should again be stated that under the amended award an 8-16 hour fireman's pay was:

Per eight hour day	$5.6109
Per hour—straight time or overtime	.7014

Fireman Conrad Anderson, No. 2 on Plaintiffs' Ex. 8a, worked only one (1) 12 hour watch in August, 1928, on a 21 watch assignment.

Paid at the end of August (Ex. 8a, Gorman, R. 265)	$6.97
A 21 watch assignment on a 12-24 hour basis produced under (b) of the Note to Rule 2 (R. 69) a daily rate of $4.646, 1½ times which is $6.97	
By the final check he was paid	1.44
	$8.41

Abridging and clarifying the two tables the following results are shown:

That Anderson was paid		
1½ days at the 8-16 hour daily rate of $5.6109		$8.41
1 day at the 8-16 hour daily rate	$5.6109	
plus 4 hours overtime at the 8 hour overtime rate of $.7014	2.8056	$8.41

That amount of $8.41, barring a fraction of a cent, is what an 8-16 hour man would have received if he had worked one watch in a month for 12 consecutive hours; he would have been paid:

8 hour daily rate	$5.6109
4 hours overtime @ $.7014	2.8056
	$8.4165

Is the District Court on a remand, if one be the result of this petition or any rehearing that may be granted, to go further and give Anderson any more than he has already received? Certainly he is not entitled to a month's pay for one 12 hour watch. This is not a punitive proceeding. The entire controversy sounds in contract. The contract is not a unilateral one; the men are bound as well as the company and when we stipulated (R. 29) that the "new watch rules" should be retroactive to March 1, 1928, if this Court affirmed the District Court's decree, we cer-

tainly did not stipulate—nor can any fair construction of the stipulation bind us—to pay the men who worked "broken assignment months" on any other basis than we would have paid an eight hour man had we required him to work the same number of 12 hour watches in a "broken assignment month."

Nor does the judgment impair the basis on which the "broken assignment" assignors were paid.

The judgment provides (R. 33) that the carrier:

> "shall pay all overtime due or to become due in accordance with said rule 8, said rule reading as follows:
>
> 'OVERTIME
>
> RULE 8.
>
> The *monthly salary* now paid the employes covered by this agreement shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the *monthly salary* at the prorate rate' ".

But neither Anderson nor any other of plaintiffs' "broken assignment" assignors received a *monthly salary* and therefore the overtime rule, No. 8, is inapplicable to them.

To find out what is applicable we must go back to rule 5 (R. 70) that:

> "RULE 5.
>
> Eight (8) consecutive hours shall constitute a day's work."

As to eight hour men, therefore, any hourage over eight hours was and always has been overtime, computable under Rule 9, and the note thereto quoted in the majority opinion (p. 5); and if an eight hour man worked a "broken assignment" in a given calendar month he received pay for an eight hour day under subdivision (a) of the Note to Rule 8 (R. 69) —unchanged by award—and if he worked overtime he received pay for overtime under Rule 11 (R. 73) —overtime computed on actual method of computation, provided for in Rule 9,* which is exactly the way plaintiffs' "broken assignment" assignors were treated by the final settlement.

From Plaintiffs' Exhibit 8a we could multiply the Anderson illustration indefinitely. The figures are therein set forth and we understood are unquestioned.

But there is one further illustration we desire to give because it shows a fireman who did not work all of the 20 or 21, 12-24 hour watches in any one of the 6 months; in each month he was a "broken assignment" employe. The table is contained in the Findings (R. 133); it is not the conclusion or construction of the District Judge, but is a summary of undisputed evidence. (Plaintiffs' Ex. 8a, Gorman R. 253-254; 306-307.)

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*Note: There were some minor inequalities that arose from time to time and that were adjusted by the interpretive memoranda described and set forth in pages 293-305 and 315-316 of the Record; but those are unnecessary complications to be dealt with here, as this discussion is on general principles to be applied.

We abridge and thereby somewhat clarify the table.

Fireman Louis J. Leimar, No. 48, Pltffs. Ex. 8a, p. 1.

12-24 hour fireman

(Daily rate for 8-16 hour fireman $5.6109
(Hourly rate for 8-16 hour fireman .7014

	"No. of 12-hr. watches	Paid Each Mo.	Paid Sept., 1928	Total Paid
March	11	$ 79.10	$13.48	$ 92.58
April	1	7.32	1.10	8.42
May	12	86.06	14.93	100.99
June	19	139.03	20.88	159.91
July	19	139.03	20.88	159.91
August	19	132.41	27.50	159.91
	81	$582.95	$98.77	$681.72

(a) 81 12-hr. days=121½ 8-hr. days at $5.6109=$681.72

(b) 81 12-hr. days=972 hours at .7014=$681.72

(c) 81 12-hr. days=
81 8-hr. days at $5.6109 or $454.48
324 hours overtime at .7014 or 227.25
$681.72"

It is perfectly obvious that there was no "monthly salary" paid Leimar to which Rule 8, the overtime rule, could be applied as in no month did he work the full number of watches. Therefore in each month he worked a "broken assignment" as referred to in the

Note to Rule 2 (R. 69) or as expressed in the last sentence of that Rule, in each month he was an employe whose "monthly assignment is (was) broken."

It is indisputably and mathematically true that, no matter how the payments to him be analyzed, whether by the month, or by the entire period, or under any of the methods (a), (b) or (c) shown in the above table, the result is the same—he received the full daily pay of $5.6109 of an 8-16 hour fireman (as increased by the award) for the first 8 hours of each 12 hour watch and the full hourly rate of such 8-16 hour fireman—$.7014 for each of the four hours he worked in excess of the eight hours.

We again accent that we are now talking about "broken assignment" months, not about months in which a 12-24 man worked each of the 20 or 21, 12-24 watches during that month. With that phase we will next deal.

The majority opinion says:

> "The first disputed question is whether overtime shall be paid crew members working 12 hours in a day in addition to the monthly salary referred to in Rule 8. The appellees claim that the phrase 'All service hourage in excess of the present recognized straight time assignment' does not mean in excess of an assignment of eight hours per day provided in Rule 6, but that it means in excess of 48 hours per week of total time.
>
> 'Mr. Sharp. (For seamen.) As a part of this formula, will you state whether the formula contemplated that before a 12- and 24-hour man

should be entitled to any overtime he should give 48 hours' service in a week.

'Mr. Hancock. (For ferry owners.) That is correct.' "

The above quotation (from R. 225) which is that relied on by appellants, does not go far enough. From succeeding testimony by the same witness it is perfectly plain that Mr. Hancock was referring to a case where a 12-24 hour man worked an entire month and during one of the weeks of that month worked only 48 hours. He correctly says that in calculating what was due him for that entire month he received no credit for overtime *as such during that 48 hour week.* But in adjusting in the final settlement his additional pay for that month in which he worked every watch, and paid for on the same basis as the 8-16 hour men (R. 225-226) every hour he worked over eight hours in one watch was taken into consideration.

Later he made that clearer if indeed what was actually done is not conclusively shown by plaintiffs' exhibit 8 A (the photostat).

It is apparent from the following that Mr. Hancock, in referring to a 12-24 hour man working a 48 hour week was referring to such a man who worked the entire month:

(Cross-ex. R. 239.)

"Q. Now in the week in which a man worked 48 hours, under your formula, if you were entitled to 48 hours work before the man is entitled to overtime, under your formula he would get no overtime at all for that week.

A. He would have worked 48 hours. But you will remember *that man was paid on a monthly basis.* Q. Yes.

A. *He was paid on a monthly basis.* That is the angle that you must consider there.

Q. Yes, I am glad you brought that out. But let me still direct your attention to the week in which he worked four 12-hour shifts, or a total of 48 hours. Under your formula, the man having been paid a monthly salary, was entitled to no overtime pay at all because he had worked no overtime, because he had worked only 48 hours that week.

A. No. *If you allocate it down to the individual week* in which the man through the alternating of the crews only worked the 48 hours, my formula if applied to a man who worked under a broken shift arrangement, only four shifts, or 48 hours within that week, he would not have any overtime.

Q. And as a matter of fact, that was the method you applied in figuring the overtime checks, samples of which have been introduced in evidence?

A. The formula says that they will be taken by the month."

Mr. Hancock testified (R. 220) that he prepared a formula upon which the back-pay checks were issued.

That formula, printed in R. pp. 220-222 after stating the increased monthly, daily and hourly rates for each class, states that the balance due should be arrived at by taking "the total number of eight (8) hour days, and the number of hours overtime served during a month, and multiply the same by the above

enumerated daily and hourly rates, then allowed as additional compensation, the difference between the total so obtained and the amount of compensation (exclusive of any special adjustments) the employe has already received for that month. In most instances this can be reduced to a certain additional amount per day or hour, and so shown on the payroll for more complete record purposes."

He denied most emphatically that all of the hours for the six months were lumped together and a divisor used (R. 224) and points to the formula as requiring the six months to be computed separately.

Mr. Gorman, who prepared the pay-rolls, testified (R. 252) that he followed the Hancock formula.

As to "broken assignment" months what else could have been done than use the Hancock formula? (We will come to the "full-service" months later).

That formula for back pay provided in terms and effect as we have seen:

1. That the computation be made by the calendar month.

2. That the total number of 8 hour days should be taken, and "the number of hours overtime served" during that month.

3. That those two items should, respectively, be multiplied by "the above daily and hourly rates" i.e. in the case of a fireman the 8-16 hour rate of $5.6109 per day and 70.14 cents per hour.

4. That from that total should be deducted what had already been received by the employe

for that month (not including special adjustments e. g. overtime over 12 hours).

5. That the balance thus arrived at should be paid.

That course was followed, as we have shown above, by the two typical examples of broken assignment cases and, as plaintiffs' Ex. 8A shows, as to all broken assignment cases.

The final result as to broken assignment months was to give the 12-hour employe exactly what the eight hour man would have received if he had worked the same number of 12-hour watches. What else could have been done? Rule 8 as we have shown was inapplicable because no monthly wage had been earned or paid. Surely in the face of appellant's positive reiteration that under the retroactive clause the twelve hour watch rules should be considered as non-existent during that six months, there is no basis for claiming that the broken assignment men were entitled to retain 1½ days pay at the 12-24 hour rate for the first 8 hours of each broken assignment watch (which was what they have been paid monthly during the 6 months) and receive in addition to that 4 hours overtime at the 8 hour rate. Yet that is precisely what appellants' claim amounts to. In one breath they say the 12-24 hour watch and everything in the rules pertaining to it retroactively went out of existence, and in the next that they can as to "broken assignment" months retain for the first 8 hours of each 12 hour watch the 1½ days' pay received by them monthly

for the entire 12 hours, and in addition exact 4 hours overtime for the remaining four hours.

And we respectfully insist that neither that claim nor our claim that the broken assignment months have been paid for in full, has been passed on by the majority opinion.

Under what rule, may we respectfully ask, is the District Court to pass on this "broken assignment" question, if the case be remanded in the present state of the record on appeal?

We feel that we have paid these broken assignment claims in full but, may be respectfully ask, is that the opinion of this Court? And if the Court is not of that opinion, on what basis, we again respectfully ask, should we have paid the back-pay or overtime, if that term be preferred, for the six months in question on these "broken assignments"?

The majority opinion says (p. 3):

> "The first disputed question is whether overtime shall be paid crew members working 12 hours in a day in addition to the monthly salary referred to in Rule 8. The appellees claim that the phrase 'All service hourage in excess of the present recognized straight time assignment' does not mean in excess of an assignment of eight hours per day provided in Rule 6, but that it means in excess of 48 hours per week of total time."

But obviously Rule 8 is out of consideration as to a "broken assignment" month, because no monthly salary was paid for that month. We think it equally obvious that the learned author of the opinion had in

mind in the first sentence just quoted a case where a man received a monthly salary for a given month. But if he did, and we so construe the sentence, how is the District Court, if the case be remanded, to construe the language on page 5 of the Opinion that—

> "The accounting is a matter for the trial court, and should be conducted on an interpretion of the award which will give to the members of the crews overtime for any day's services for the hours *in excess of any eight hours* in that day. Since the hourly overtime is the same as hourly straight time, it is only necessary to compute the straight time hourly wage."

But what basis is to be used for computing the pay for the first "eight hours in that day" on the excess over which the District Court is to compute overtime "at the straight time hourly wage"? Certainly in the case of a broken assignment month the monthly salary rate of $146.35 cannot be used in combination with Rule 8 because no monthly salary was earned and none was paid, nor was it ever claimed or demanded by the men.

As to the "broken assignment" months, we think it must be concluded that the majority opinion left those out of consideration and dealt solely with full service months where a monthly salary had been paid. (See such a case in Finding XV, Table, R. 134.) The entire majority opinion—in its discussion of overtime rates—applies to any one of the months, or to all of them, in the Table in Finding XV (R. 134). It indubitably does not apply to "broken assignment" months.

There are many of these. In the table on page 309 of the Record it is shown (col. 3) that the total number of 12 hour watches in broken monthly assignments here involved are 6189 on the Southern Pacific and 914 on the Northwestern Pacific, as against 1106 full monthly assignments at 12 hours each—20 or 21 watches per month—on the Southern Pacific and 116 on the Northwestern Pacific, of 20 or 21 watches each.

We most respectfully but most earnestly insist that as to these "broken assignment" months, the men in any view of the case and even under the majority opinion have been paid in full; but nevertheless we feel that the District Court as well as the parties are entitled to a clear and unambiguous rule or formula from this court on that point so that, if the case be remanded, the District Court will have an authoritative rule to follow, and so that neither party will feel constrained again to appeal to this court from the decree of the District Court.

We pass now to the full-service months—an entirely different question as the majority opinion has, apparently, viewed the issues in this suit.

THE FULL-SERVICE MONTHS.

We use the expression full-service months as a short description of calendar months in which an assignor to plaintiffs worked all of the 20 or 21, 12-24 hour watches that fell within that calendar month and was paid the monthly rate as increased by the award in the case of a fireman—$146.35.

Any month worked by Fireman Costa as shown in the Table in Finding XV (R. 134), is a "full-service" month.

As to *this class of claims,* we respectfully beg to differ from the majority opinion (p. 3) when it says that the "first disputed question is whether overtime shall be paid crew members working 12 hours in a day in addition to the monthly salary at the prorate rate". That remark for the reasons already shown does not apply to "broken assignments".

As we see it the problem is a composite one and can be stated in a series of related facts:

1. The stipulation *pendente lite* provided that if this Court affirmed the District Court the *"new watch rules"* should be *retroactive* to March 1, 1928 (R. 29); and the final judgment directed retroactive back pay accordingly (R. 34).

2. The effect of the retroactive application of the award was to require all parties to consider the 12-24 hour watch for assigned crews—abolished by the award—as non-existent from and after March 1, 1928; and to settle for the services of plaintiffs' assignors during the six months following March 1, 1928 on that hypothesis.

3. Thus, for the purposes of the settlement at the end of the six months period the assignors must be considered as men who had worked 12 hours on watch and then 24 hours *without any contract provision* permitting such an assignment of crews.

4. The only assigned crews permitted under the retroactive award (with exceptions herein imma-

terial) were (Award, R. 25) provided by the amended Section 6 to "work on the basis of eight hours or less each day *for six consecutive days.*"

5. None of the assignors worked six consecutive days; therefore it cannot be said that they worked on the only permissible basis under the amended Section 6.

6. But during the time the former 12-24 hour men, the assignors, continued to work on watches of that character they were paid the increased rates of monthly pay provided by Section 2, which monthly rates applied to all employes of each class, regardless of watch, but were payable if and only if, the employee worked all watches in a month. (Rule to Section 2—unchanged.)

7. Referring now solely to these "full service" assignors who worked every watch in a given month on a 12-24 basis, the question is whether there can now be applied to them Rule 8, "overtime", which provides that the "monthly salary * * * shall cover the *present recognized* straight time assignment" in the face of the fact that the settlement at the end of the six months was necessarily based on the stipulated hypothesis that during those six months the award was in effect, under which award *there was no recognized straight time assignment* except that of *eight hours per day for six consecutive days* under amended Rule 6—an assignment which none of the assignors held or worked at during those six months.

We respectfully submit that appellants cannot legitimately claim that the award was retroactive and

at the same time claim that they were entitled to monthly pay for a class of watch that the award abolished, but that the monthly pay should apply only for the first eight hours of each tour of duty, and then claim that they may switch over to the eight-hour-six-consecutive-day watch, which they did not work and on that different basis claim four hours overtime at eight hour pay.

Here again, as in the case of the "broken assignment" months, the question is not what the Hancock formula means or does not mean or what Mr. Hancock or Mr. Deal or any one else thinks it means.

The plain and simple question is: How much money, altogether, did the "full service" men receive for each full service month, and is that a fair compliance with the stipulation and judgment?

In the contract *as amended by the award* there can be found no provision whatever that authorizes the carrier to create a 12-24 hour assigned crew. Nowhere in that amended contract is there any provision that authorizes a monthly salary for other than "the present recognized straight time assignment" and treating the award as retroactive to March 1, 1928, the only "present recognized straight time assignment" during the six months in question was the one provided by the amended Section 6 upon which not one of the "full-service" men worked.

To say, as did appellants' counsel, that the monthly salary should be retained for the first 8 hours of the 20 or 21 watches actually worked in a full month's service, because those were all the watches assigned

to the men, is to beg the question. Rule 8 says the "present recognized straight time assignment", and if the award be treated as retroactive, there was none other that answered that description than eight hours per day for *six consecutive* days.

APPELLEES' POSITION MISUNDERSTOOD.

The majority opinion says:

> "Appellee's position is that the shipowner could assign a watch to a seaman of 2 hours on Monday; 14 hours on Tuesday; 4 hours on Wednesday; 16 hours on Thursday; 2 hours on Friday; and 10 hours on Saturday, and still owe him no overtime."

This statement is based on a somewhat reckless statement to that effect in appellants' brief, unsupported by any fair references to the record.

We do not and never have taken any position that leads to that conclusion.

Rule 5 (R. 70), which was not submitted to arbitration, provides (R. 70) that: "Eight consecutive hours shall constitute a day's work."

The eight hour watch was for "eight hours *or less* on watch each day for six consecutive days" (Rule 6) as it stood before the award (R. 70) and as the award amended it. (R. 25.)

Counsel for appellants knew better than to take so unjustified a position, and certainly any fair consideration of the evidence and of our reply brief will

not show that at any time we have placed any such interpretation on the award.

While the majority opinion is technically correct in calling appellees "ship owners" and appellants' assignors "seamen", both are in fact under the Railway Labor Act, and the rule that eight hours *or less* constitute a day's work is universal in all branches of service that are covered by contracts under that Act.

Referring again to the quotation next above, the "seamen" would, *under the contract provisions,* have received a full 8 hour day pay for Monday, Wednesday and Friday and 6 hours overtime on Tuesday, 8 on Thursday and 2 on Saturday in addition to pay for an 8-hour day on Tuesday, Thursday and Saturday.

Appellants' counsel merely created a "man of straw" which had no body or substance.

It must be remembered that the situation was a novel one. These assignors were working on 12-24 hour watches when the arbitration agreement was made. And when the award was made, pending an effort to impeach it, they merely continued on the boats that operated on a 12-24 hour basis. There was no economic pressure brought to bear to compel them to keep on serving the 12 hour watches. No one knew but what the award might have been set aside. The stipulation is evidence of an uncertain state of mind common to both sides. If the award had not been set aside the plaintiffs' assignors would have had

no extra pay due them; the "full service" men would have had currently the full month's pay common to all classes of watches; the broken assignment men would fully have been paid under contract rules.

The situation affords no precedent for future relations between the parties; it is extremely unlikely that it will ever occur again.

In this case there is no magic in the word overtime. If the overtime rate was punitive and larger than the straight-time rate there would be justification for the observance of the distinction. Much of the confusion in the record was caused by the stubborn use by respective sides of "overtime pay" and "back pay".

But as the majority opinion points out, the overtime hourly rate is the straight-time hourly rate and it can make no difference to a man or to his assignee whether he has, for a twelve hour watch, received an eight hour man's daily pay for the first eight hours and four hours overtime pay at the eight hour man's "overtime rate", or whether he receives 12 times the eight hour man's hourly rate.

We trust that in the light of this—a somewhat different presentation of this point from that made in our Reply Brief, the Court will see fit to recede from the statement in the majority opinion that if our principle of interpretation be correct "the 12-hour watch could be restored without the deterrent of the overtime." The Railway Labor Act expressly contemplates

that all regular service, rates of pay, rules and working conditions of a given class of employes shall be governed by a contract under the provisions of the act, and must be embodied in that contract, either expressly or by necessary implication. To hold otherwise would be to render the act abortive. To say that under the existing contract of the Ferryboatmen, as amended by the award and especially in the face of the arbitration proceedings, a system of 12-24 watches could now be set up without paying overtime, and in face of the specific provision in the contract that 8 hours or less will constitute a day's work, is, we respectfully submit, a conclusion that, upon analysis, will not be found to be sustainable under the Railway Labor Act, or any fair principle of interpretation of contracts.

We think it true that special contracts may be made by employes who are covered by general contract under the Railway Labor Act, or even that such employes may in special cases recover upon a quantum meruit, but that such course may be followed as a practice to thwart and nullify the express intention of Congress, or to escape the effect of a contract made by a majority of the class, is, we believe, unsustainable, on grounds both of statutory construction and public policy.

The difficulty in arriving at a settlement with the "full service men" at the end of the six months period lay in the fact that they had been working watches that were not provided for in the contract as amended, and in the further consideration that to pay them an

additional amount per hour, or per 8 hour day to that paid the 8-16 men that worked during the same period and in the same class of service, would be to discriminate against the 8-16 men (under the plaintiffs' claim) to the extent of about 16 per cent per hour and thus in effect nullify one of the major purposes of the arbitration with which we have dealt extensively in our Reply Brief, which was to equalize the hourly pay of both the 8 and 12 hour classes of employes.

It is not correct, and we desire to emphasize this denial as strongly as we may, that, as stated on page 4 of the majority opinion, our interpretation of the eight hour assignment per day of straight time is that it means "any 48 hours per six days distributed at the convenience of the employer."

The final settlement with these "full service" men is illustrated by Finding XV (R. 134), which is based on plaintiffs' Exhibit 8A and on the Gorman testimony and is the case of A. L. Costa, Fireman No. 8, on plaintiffs' Exhibit 8A, page on, who worked every 12 hour period during six months without any layoff at all. (Gorman R. 252.) Gorman says: "His overtime pay was figured month by month under the formula."

If the reader will examine that table, it will be seen that Costa, in the twenty-one watch months was paid a total of $176.74, made up of the monthly salary of $146.35, the same salary paid to an 8 hour fireman plus $30.39 additional pay. Whether that additional check be called "back-pay" or "additional overtime"

is merely quibbling, because the straight time pay and the overtime pay per hour are exactly the same.

In a 21 watch month he served 252 hours or 31½ eight hour days amounting to $176.74, which is equal to 31½ eight hour days at $5.1069 per day, or computing that time on an hourly basis, the $176.74 is equal to 252 hours at 70.14 cents per hour. The same computation applies exactly to each of the months shown in the table in Finding XV (R. 134). We repeat that Costa was not working on any watch recognized by Rule 8, which was unchanged by the award. The method adopted was exactly the same as that which would have been followed if an 8-16 hour man had worked the same number of 12 hour watches in the month through stress of circumstances or unusual conditions.

The construction contended for by appellants and apparently adopted by the majority opinion is based upon considerations outside of the record and irrelevant to the case. As said by Judge Wilbur in the dissenting opinion, the fact that the carrier neglected to secure six successive days labor from plaintiffs' assignors is no reason why it should be punished correspondingly. "This is not the question involved. It is a simple question of the interpretation of a contract as amended by the award."

It certainly could not have been within the contemplation of the majority of the Arbitration Board that any such result would follow their equalization.

They endeavored to and did remove a ten to twelve per cent hourly differential against the 12-hour employees by abolishing the 12-hour assigned crews. Nor could it have been within the intent of the parties to the stipulation, or the Court itself, that the equalization made by arbitration should be dislocated in the event of an affirmance of the District Court judgment by "paying these full service men" during any one calendar month the same monthly rate of pay that the 8-hour men received and then an additional allowance for overtime, the net result of which would be to give the full service men on the settlement 16 per cent more per hour than their fellow workers received during the same month.

In Conclusion, it is respectfully submitted that a rehearing herein should be granted:

(1) For the purpose of considering and definitely determining the proper basis of settlement that should have been made at the end of the six month period for each broken assignment month;

(2) To reconsider the question of the proper basis of settlement for the full service months and the unfair and inequitable consequences that flow from the position taken by appellants; and

(3) That if it again be decided not to affirm the decree but to remand the case for further proceedings in accordance with the opinion of this Court, the Court below be given certain and definite rules for application to the two classes of services performed by plain-

tiffs' assignors; and thus prevent any confusion in the hearing in the District Court and any speculation by that Court as to what rules should be followed, and further, and perhaps of equal importance, to remove as far as practicable the incentive to either party again to appeal to this Court from the final decree of the District Court.

Dated, San Francisco, California,
July 29, 1936.

Respectfully submitted,
HENLEY C. BOOTH,
A. A. JONES,
Attorneys for Appellees and Petitioners.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for appellees and petitioners in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 29, 1936.

HENLEY C. BOOTH,
A. A. JONES,
Counsel for Appellees and Petitioners.